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Stretching the Limits of the ADA: Asymptomatic HIV-Positive Status as a Disability in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998)

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Stretching the Limits of the ADA: Asymptomatic HIV-Positive Status as a Disability in *Bragdon v.* *Abbott*, 118 S. Ct. 2196 (1998)

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I. INTRODUCTION

On July 26, 1990, President Bush signed the Americans with Disabilities Act¹ [hereinafter the ADA] heralding the Act as a historic opportunity:

[The ADA] signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.²

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1. 42 U.S.C. §§ 12101-12213 (1994).

2. Statement by President George Bush Upon Signing S. 933, *reprinted in* 1990 U.S.C.C.A.N. 601, 602. Others similarly viewed this bill as a uniquely historic opportunity. Senator Harkin declared,

the ADA is about abilities, not disabilities. It is about unleashing the talents, skills, enthusiasms and commitment of 43 million Americans who want to contribute but are denied basic access that will enable them to contribute to society. With the passage of this historic legislation, this

He maintained that fears about the alleged vagueness of the ADA, or that it would lead to a litigation explosion were "misplaced."³ Eight years have passed since the ADA was enacted and the warning cries of statutory vagueness have become all too real as revealed in conflicting litigation concerning the ADA's application to HIV-positive individuals.⁴

The ADA's definition of disability can be blamed for some of these problems. The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁵ The definition mirrors the definition of "handicapped" used in the Rehabilitation Act of

20th century emancipation proclamation for people with disabilities, we will deny them that opportunity no longer.

135 CONG. REC. S10708-01 (1989)(statement of Sen. Harkin).

3. Statement by President George Bush Upon Signing S. 933, reprinted in 1990 U.S.C.C.A.N. 601, 601. Congressional debates indicate some reservation about the apparently vague nature of the ADA. Although Senator Armstrong voted for the legislation, he noted his reluctance, calling the ADA's disability definition "vague and elastic." He concluded,

[t]he bill is a legislative Rorschach test, an inkblot whose meaning and significance will be determined through years of costly litigation. While I voted for this bill because I believe that the rights of people with disabilities must be protected, I did so with the awareness that it will engender wave upon wave of court rulings that will extend the bill far beyond its intended purposes.

136 CONG. REC. S9694 (1990)(statement of Sen. Armstrong). See also 136 CONG. REC. H2421-02 (1990)(statement of Rep. Burton)("The problem is the bill has some major, major problems that are going to lead to chaos, I think, in some areas down the road.")

4. The focus of this Note is primarily the *Bragdon* decision in which the United States Supreme Court held that an asymptomatic HIV-positive woman is disabled under the ADA. *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998). For general comment about the issues in the *Bragdon* case and a discussion of the duty of health care providers to treat HIV-positive patients, see John Gibeaut, *Filling a Need*, A.B.A. J., July 1997, at 48. Gibeaut's article concerns the First Circuit's decision rendered in *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997), vacated, 118 S. Ct. 2196 (1998). Other cases in accordance with *Bragdon* include *Hernandez v. Prudential Ins. Co. of America*, 977 F. Supp. 1160 (M.D. Fla. 1997)(HIV-positive employee disabled because he had a physical impairment which substantially limited the major life activities of reproduction and caring for himself); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763 (E.D. Tex. 1996)(AIDS is a per se disability under the ADA); *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310 (E.D. Pa. 1994)(attorney infected with HIV disabled under the ADA). Compare *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156 (4th Cir. 1997)(asymptomatic HIV-positive individual not disabled under the ADA); *Cortes v. McDonald's Corp.*, 955 F. Supp. 541 (E.D. N.C. 1996)(HIV-positive person not disabled under the ADA); *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995)(HIV-positive infection does not constitute a per se ADA disability).
5. 42 U.S.C. § 12102(2) (1994).

1973 and the Fair Housing Amendments Act of 1988.⁶ Rather than definitively listing disabilities in the Act, an individualized inquiry is required.⁷

Because much of the case law centers on the first prong of the disability definition, "a physical or mental impairment that substantially limits one or more of the major life activities . . ."⁸, this Note likewise focuses on the first section of the definition. In the cases involving asymptomatic⁹ HIV-positive persons who are asserting an ADA claim, the issue typically is: If the plaintiff is asymptomatic, how can he or she have a major life activity substantially limited? According to the Center for Disease Control (CDC), the number of HIV-positive Americans is as high as 900,000; and an estimated half of those are unaware of their infection.¹⁰ Given the large numbers infected, the application of the ADA to asymptomatic HIV-positive persons has far-reaching consequences.

*Bragdon v. Abbott*¹¹ provides an explanation to the seeming contradiction of how an asymptomatic person can have a major life activity substantially limited. In *Bragdon*, the plaintiff, Sidney Abbott, was an asymptomatic HIV-positive patient of a Maine dentist, Randon Bragdon. Pursuant to an infectious disease policy, Bragdon told Abbott that he would fill her cavity in the hospital, not his office. Although his fee would remain the same, she would be required to pay any additional hospital charges. She refused and filed a complaint under the ADA.¹² The U.S. District Court in Maine granted summary judgment for Abbott.¹³ Bragdon appealed, but the First Circuit affirmed the grant of summary judgment. The First Circuit agreed that Abbott was indeed disabled because her impairment of HIV infection substantially limited the major life activity of reproduction. She was limited in this major life activity because she feared passing the infec-

6. H.R. REP. NO. 101-485 (III), at 26-27 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 449-50. For further discussion on the definition of disability, see Amalia Magdalena Villalba, Comment, *Defining "Disability" Under the Americans with Disabilities Act*, 22 U. BALT. L. REV. 357 (1993).

7. See *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 166 (4th Cir. 1997); *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995).

8. 42 U.S.C. § 12102(2)(A) (1994).

9. An asymptomatic person presents no symptoms of her disease. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 111 (9th ed. 1991).

10. See Chandler Burr, *The AIDS Exception: Privacy v. Public Health*, ATLANTIC MONTHLY, June 1997, at 61.

11. 118 S. Ct. 2196 (1998).

12. See *id.* at 2201; see also Gibeaut, *supra* note 4, at 50 (noting the additional costs of treatment in the hospital would increase the price of the filling procedure from \$35 to almost \$200).

13. See *Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

tion to the child, impairing her own immune system through pregnancy,¹⁴ and finally, because she feared that she might not live long enough to finish raising the child.¹⁵ The court rejected the dentist's direct threat defense, holding that "Dr. Bragdon has failed to present meaningfully probative evidence that treating Ms. Abbott would have posed a medically significant risk to his health or safety."¹⁶

Bragdon appealed to the United States Supreme Court, which vacated the First Circuit's decision and remanded on the direct threat issue.¹⁷ In a 5-4 decision, the Supreme Court held that HIV infection, whether symptomatic or asymptomatic, is a disability under the ADA because it is a physical or mental impairment which substantially limits the major life activity of reproduction.¹⁸ HIV infection impairs the hemic and lymphatic systems, thus meeting the physical or mental impairment requirement.¹⁹ According to the Supreme Court, reproduction is a major life activity because of its significance.²⁰ The Court found that Abbott was substantially limited in her reproductive activities because of the risk of HIV transmission during sexual relations and during gestation and childbirth.²¹

This Note will point out the problems with the *Bragdon* decision and ultimately argue that an asymptomatic HIV-positive person is not disabled under the first definition of disability contained in the ADA; that is, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."²² An asymptomatic HIV-positive individual is not disabled within that definition because, even though he or she suffers from a physical impairment, the impairment does not substantially limit any major life activity.²³ Although this Note rejects the argument that reproduction is a major life activity²⁴ even assuming *arguendo* that reproduction is a major

14. However, this fear of impairing one's immune system through pregnancy does not clearly appear to be medically legitimate. See Banks, *infra* note 114, at 63 n.33.

15. See *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated*, 118 S. Ct. 554 (1998).

16. *Id.* at 948-49.

17. See *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998).

18. See *id.* at 2207.

19. See *id.* at 2204.

20. See *id.* at 2205.

21. See *id.* at 2206-07.

22. 42 U.S.C. § 12102(2)(A) (1994).

23. For an argument that asymptomatic HIV infection is a handicap under the Rehabilitation Act, see Robert A. Kushen, *Asymptomatic Infection with the AIDS Virus as a Handicap under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563 (1988).

24. Prior to the Supreme Court decision in *Bragdon*, federal courts were divided over the issue of reproduction as a major life activity. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996), and *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D. La. 1995), both hold that reproduction is not a major life activity

life activity within the meaning of the ADA, the ability to reproduce is not substantially limited. Any limitation comes not from the physical impairment itself, but from the individual's reaction to the disease.²⁵

II. BACKGROUND

When Plaintiff Sidney Abbott went to defendant Dr. Randon Bragdon's office for a dental visit on September 16, 1994, she had been HIV positive for eight years.²⁶ She indicated her status on the patient registration form and was asymptomatic at the time. When Dr. Bragdon discovered that Ms. Abbott had a cavity, he informed her that he would treat her in the hospital, rather than at his office, pursuant to his infectious disease policy. Although he would charge his regular fee, Abbott would be responsible for any additional hospital costs. She refused and filed suit under the ADA.²⁷

The U.S. District Court granted summary judgment in favor of Abbott, finding that she was disabled as a matter of law.²⁸ Using the first prong of the disability definition, the District Court concluded that asymptomatic HIV infection does constitute a physical impairment,²⁹ citing the interpretive ADA guidelines³⁰ and case law.³¹ The

within the meaning of the ADA. However, *Soodman v. Wildman et. al.*, No. 95. C 3834, 1997 WL 106257 (N.D. Ill. February 10, 1997), *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797 (N.D. Ill. 1996), and *Erickson v. Board of Governors of State Colleges*, 911 F. Supp. 316 (N.D. Ill. 1995), all hold that reproduction does constitute a major life activity. The court in *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156 (4th Cir. 1997), remains uncertain: "We agree that procreation is a fundamental human activity, but are not certain that it is one of the major life activities contemplated by the ADA." *Id.* at 170 (emphasis in original). See *infra* note 76 for reference to legal scholarship concerning this issue.

25. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 171 (4th Cir. 1997) (citing Memorandum of Douglas M. Kmiec, Acting Assistant Att'y General, Off. of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept 27, 1988)).

26. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2200-01 (1998).

27. *See id.* at 2201.

28. *See Abbott v. Bragdon*, 912 F. Supp. 580, 584-85 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

29. *See id.* at 585.

30. *See* 28 C.F.R. § 36.104(1) (1997). Subsection (iii) of the impairment definition under § 36.104(1) states, "[t]he phrase physical or mental impairment includes, . . . HIV disease (whether symptomatic or asymptomatic)."

31. *Abbott v. Bragdon*, 912 F. Supp. 580, 585 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998), cites the following cases to support its argument that HIV is a physical impairment under the ADA: *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *EEOC v. Chemtech Int'l Corp.*, 1995 WL 608355 at *1 (S.D. Tex. 1995); *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995); *Robinson v. Henry Ford Health Sys.*, 892 F. Supp. 176, 180 (E.D. Mich. 1994); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1318-20 (E.D. Pa. 1994); *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993); *Doe v. District of Columbia*, 796 F. Supp. 559, 568

court found that reproduction was a major life activity under the ADA by focusing on the fundamental nature of reproduction and also by concluding that the interpretive guidelines that listed major life activities (but did not include reproduction) were merely an illustrative rather than exhaustive list.³² Finally, the District Court found the required substantial limitation. The court noted, "[b]y requiring an individual's physical or mental impairment to *substantially* limit a major life activity, the statute does not contemplate a complete inability of that individual to engage in a particular major life activity."³³ Abbott was substantially limited in her ability to reproduce because childbirth poses health risks to an HIV-positive mother. An HIV-positive mother might infect her child through pregnancy, childbirth, or breastfeeding. The court also found that Abbott's ability to reproduce was limited because an HIV-positive mother might die before she could complete her child's upbringing.³⁴ Bragdon appealed the grant of summary judgment for Abbott.³⁵

The First Circuit similarly agreed that Abbott was disabled under the ADA's first definition of disability.³⁶ With little discussion, the First Circuit held that she easily met the requisite physical or mental impairment required under the ADA.³⁷ Providing support for this finding were both Equal Employment Opportunity Commission Regulations, which state that the term "physical impairment" includes HIV,³⁸ and case law.³⁹ Although the First Circuit acknowledged,

(D.D.C. 1992); *Glanz v. Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991). Although not cited by the Abbott court, *Cortes v. McDonald's Corp.*, 955 F. Supp. 541, 545 (E.D.N.C. 1996) similarly holds that HIV infection constitutes a physical impairment.

32. See *Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

33. *Id.* at 587 (emphasis in original).

34. See *id.*

35. See *Abbott v. Bragdon*, 107 F.3d 934, 938 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

36. It is interesting to note that Abbott did not claim that she was regarded as having a disability, which is another prong of the disability definition. See 42 U.S.C. § 12102(2)(C) (1994). Dr. Bragdon's proposed differential treatment of Abbott (i.e. filling her cavity in the hospital instead of at the office) supports the argument that Bragdon regarded her as having a disability, and thus was disabled under the ADA. The United States, in its intervenor-plaintiff brief, did assert that Abbott was disabled under this third prong because "society commonly regards individuals who are infected with HIV as having substantially limiting impairments." *Abbott v. Bragdon*, 107 F.3d 934, 938, n.2 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998). However, the circuit court did not address that contention. For an extensive treatment of the "regarded as" prong of the disability definition, see *Runnebaum v. NationsBank of Md., N.A.*, 95 F.3d 1285 (4th Cir. 1996), *rev'd en banc*, 123 F.3d 156 (4th Cir. 1997).

37. See *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

38. 28 C.F.R. § 36.104 (1996).

"[t]he question of whether reproduction in large constitutes a major life activity under the ADA is not free from doubt,"⁴⁰ it ultimately concluded that reproduction was a major life activity. Using the dictionary definitions of "major" as "greater than others in importance or rank," the court decided that the significance of reproduction, "which is both the source of all life and one of life's most important activities," easily satisfies the major life activity requirement.⁴¹ Bragdon argued that reproduction was a lifestyle choice and that major life activities do not include lifestyle choices, or "activities that many people decide never to do."⁴² The First Circuit rejected this argument and further did not agree that an activity must be done frequently,⁴³ or universally to constitute a major life activity.⁴⁴ Bragdon next argued that Abbott was not disabled "unless reproduction [was] a major life activity for her."⁴⁵ Although the court recognized the need for an individualized inquiry into whether a person was disabled, it rejected the notion that "a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity" was required.⁴⁶ That is, the plaintiff need not show that the major life activity was especially important to her.⁴⁷ Finally, the First Circuit held that Abbott had demonstrated that her HIV infection substantially limited her major life activity of reproduction. Although Bragdon conceded that a pregnant mother without AZT drug therapy faces a 25% risk of transmitting HIV to her child and an 8% chance with AZT, he argued that the issue of a substantial limitation was still unresolved and thus should preclude summary judgment.⁴⁸ The court again rejected Bragdon's argument:

We are unconvinced. No reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is

39. The *Abbott* court cited *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) and *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990).

40. *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

41. *Id.* at 939-940.

42. *Id.* For his lifestyle choice argument, Bragdon cited *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 106 n.1 (S.D. Iowa 1995) ("Some people choose not to have children, but all people care for themselves, perform manual tasks, walk, see, hear, speak, breathe, learn, and work, unless a handicap or illness prevents them from doing so."), *aff'd*, 95 F.3d 674 (8th Cir. 1996).

43. See *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) ("Reproduction is not an activity engaged in with the same degree of frequency as the listed activities of walking, seeing, speaking, breathing, learning, and working.")

44. See *Abbott v. Bragdon*, 107 F.3d 934, 940-41 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

45. *Id.* at 941 (emphasis in original).

46. *Id.*

47. See *id.*

48. See *id.* at 942.

not a substantial restriction on reproductive activity In addition, Ms. Abbott faces the unfortunate reality that even if she gives birth to a healthy child, she probably will not live long enough to complete the task of raising the child to adulthood. We thus hold that HIV-positive status is a physical impairment that substantially limits a fecund woman's major life activity of reproduction. Ms. Abbott therefore is disabled within the purview of the ADA.⁴⁹

Bragdon appealed to the United States Supreme Court, which held that HIV infection, even in its asymptomatic stage, constitutes a disability within the purview of the ADA. In Justice Kennedy's majority opinion, the Court discussed at length the physical effects of HIV infection on the hemic and lymphatic systems, citing various medical and scientific studies, and ultimately held that these detrimental effects constituted a physical impairment.⁵⁰

The Supreme Court noted that the ADA does not become operative unless the impairment limits a major life activity.⁵¹ The major life activity at issue in *Bragdon* was reproduction. The Court easily resolved the issue: "We ask, then, whether reproduction is a major life activity. We have little difficulty concluding that it is."⁵² The Court quoted from the First Circuit's opinion, which held that the meaning of the term "major" denotes both comparative importance and signifi-

49. *Id.* Two commentators view the court's holding that "HIV-positive status is a physical impairment that substantially limits a fecund woman's major life activity of reproduction" as quite problematic. See Wendy E. Parmet and Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7 (1997). Parmet and Jackson argue:

Thus, the court's conclusion that Ms. Abbott was disabled was based in large part on the fortuity of her own fertility. Should other courts adopt this analysis requiring an individualized demonstration of how HIV status affects an individual's own reproductive intentions, the fate of many individuals who cannot show that their HIV status had caused them to alter their childbearing plans will be uncertain. For example, a woman who had become HIV positive after menopause could not satisfy the court as to her "fecundity" Men and women who chose to have children after being infected could find themselves in a similar predicament. And, of course, many gay men might find it difficult to explain how they have altered their reproductive plans because of their infection. Thus, the protection for asymptomatic HIV-positive individuals might be quite haphazard at best and depends on a circumstance—the plaintiff's fertility and reproductive intentions—that really has nothing to do with the discrimination at issue.

Id. at 35-36.

50. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-04 (1998).

51. See *id.* at 2204.

52. *Id.* at 2205. The Court did mention that confining the discussion to reproduction may seem legalistic: "We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities." *Id.* However, since the court of appeals had considered reproduction as a major life activity and the Supreme Court granted certiorari on that question, the Supreme Court limited its discussion to reproduction. See *id.*

cance.⁵³ Bragdon argued that Congress intended the term "major life activity" to encompass only "those aspects of a person's life which have a public, economic, or daily character."⁵⁴ EEOC regulations define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."⁵⁵ The Court rejected this argument, noting that the regulations which defined "major life activity" included activities such as caring for one's self and performing manual tasks, which do not have a public or economic character.⁵⁶ Further, the Court noted, "[t]he Rehabilitation Act regulations support the inclusion of reproduction as a major life activity, since reproduction could not be regarded as less important than working and learning."⁵⁷

Finally, the Court held that HIV infection constituted a substantial limitation on reproduction. The Court stated that the possibility of transmission during sexual relations and during gestation and childbirth posed substantial limitations on reproductive activity.⁵⁸ Bragdon pointed out drug therapy reduced the risk of perinatal transmission to 8%, but the Court rejected this argument: "It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction."⁵⁹ The Court continued,

[t]he Act addresses substantial limitations on major life activities, not utter inabilities. Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation. The decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and, tragic to think, treated for the infection. The laws of some States, moreover, forbid persons infected with HIV from having sex with others, regardless of consent. . . . In the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable. For the statistical and other reasons we have cited, of course, the limitations on reproduction may be insurmountable here. . . . Respondent's HIV infection is

53. See *id.* (quoting from *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998)).

54. *Id.*

55. 29 C.F.R. § 41.31(b)(2) (1997).

56. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998).

57. *Id.*

58. See *id.* at 2206. The Court cited statistics which indicated that female to male transmission of HIV was 20-25% and mother to child transmission was 25%.

59. *Id.* There was some debate about the relevance of the 8% figure. Although the Court declined to resolve the issue, it did note, "[t]he Solicitor General questions the relevance of the 8% figure, pointing to regulatory language requiring the substantiality of a limitation to be assessed without regard to available mitigating measures." *Id.* The Solicitor General cited 28 C.F.R. pt. 36, app. B, p. 611 (1997) and 29 C.F.R. pt. 1630, app., p. 351 (1997).

a physical impairment which substantially limits a major life activity, as the ADA defines it.⁶⁰

III. ANALYSIS

The Court's decision in *Bragdon* constitutes a dangerous expansion of the ADA. Although asymptomatic HIV-positive individuals suffer from a physical impairment of their hemic and lymphatic systems,⁶¹ this impairment, in and of itself, does not substantially limit a major life activity. Therefore, asymptomatic HIV-positive individuals should not be classified as disabled under the ADA's first definition of disability. The *Bragdon* court effectively found a physical impairment, but its basis for finding a substantial limitation on a major life activity is questionable.

A. Physical Impairment Present

The Supreme Court, after citing various medical and scientific studies, concluded that Abbott clearly fulfilled the physical or mental impairment element of her ADA claim:

In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold that it is an impairment from the moment of infection. . . . [I]nfection with HIV causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.⁶²

60. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206-07 (1998)(citations omitted). The Court also cited numerous administrative and judicial precedents which have similarly construed the ADA. See *id.* at 2207-09.

61. See *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998) and *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994).

62. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2204 (1998). See *Hernandez v. Prudential Ins. Co. of America*, 977 F. Supp. 1160 (M.D. Fla. 1997); *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992); *Cortes v. McDonald's Corp.*, 955 F. Supp. 541, 545 (E.D.N.C. 1996). But see *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir 1995)(although the child was HIV positive, the court found, "[t]here is no evidence in the record that A.J. is impaired to any degree . . ."); *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156 (4th Cir. 1997), similarly held that the asymptomatic HIV-positive plaintiff was not physically impaired for the purposes of the ADA. The *Runnebaum* court first cited the dictionary meaning of impairment: "to 'make worse by or as if by diminishing in some material respect.'" *Id.* at 168 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603 (1986)). The *Runnebaum* court then concluded, "[t]he plain meaning of 'impairment' suggests that asymptomatic HIV infection will never qualify as an impairment: by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual." *Id.* at 169. This view is heav-

B. Reproduction Is Not a Major Life Activity

"An impairment alone is not a disability under the ADA. Rather, the impairment must be one which substantially limits one or more major life activities."⁶³ Although the lower courts had struggled with the notion of reproduction as a major life activity,⁶⁴ the Supreme Court did not. Rather, it had "little difficulty" concluding that reproduction was a major life activity. Relying on the First Circuit's definition of "major" as denoting significance, the Court simply stated, "[r]eproduction falls well within the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central to the life process itself."⁶⁵

The Supreme Court failed to meaningfully analyze why reproduction should be considered a major life activity. The mere assertion that it is a "significant" or "important" life activity does not necessarily mean that it is a "major life activity." Chief Justice Rehnquist, in his concurring and dissenting opinion, noted that the majority had focused on the first definition of "major", rather than the alternative definition of "greater in quantity, number, or extent."⁶⁶ He concluded the alternative definition was most consistent with the illustrative list of major life activities. In addition, although the majority had deemed the list of major life activities as merely illustrative, it had made "no attempt to demonstrate that reproduction is a major life activity in the same sense that 'caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working' are."⁶⁷ Rehnquist concluded:

No one can deny that reproductive decisions are important in a person's life. But so are decisions as to who to marry, where to live, and how to earn one's living. Fundamental importance of this sort is not the common thread linking the statute's listed activities. The common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual. They are thus quite different from the series of activities leading to the birth of a child.⁶⁸

ily criticized in the *Runnebaum* dissent. The dissent notes that the ADA does not require "a 'physical impairment' to be outwardly visible or manifest." *Id.* at 181. For further discussion on HIV infection as a physical impairment, see Kushen, *supra* note 23, at 570-73.

63. *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 773 (E.D. Tex. 1996).

64. See *supra* note 24 and accompanying text.

65. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998).

66. *Id.* at 2215 (quoting WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994))(Rehnquist, C.J., concurring in part and dissenting in part).

67. *Id.* at 2215 (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997)).

68. *Id.* Justice O'Connor similarly expressed doubt that reproduction was a major life activity:

I agree with THE CHIEF JUSTICE that respondent's claim of disability should be evaluated on an individualized basis and that she has not proven that her asymptomatic HIV status substantially limited one

Furthermore, the Court suggested that because reproduction is "central to the life process itself," it is necessarily a major life activity.⁶⁹ This rationale is highly problematic. This could logically be interpreted to mean that every physical or bodily function is a "major life activity." All the bodily systems working together are central to the life process, so if one suffers a minor impairment in the digestive system, one could rationally argue that his or her major life activity of digestion is substantially limited.⁷⁰

Although the Supreme Court did not provide a detailed analysis why reproduction should be considered a major life activity, several lower courts have. In *Pacourek v. Inland Steel Co.*,⁷¹ the district court held that reproduction was a major life activity because the reproductive system was listed in the ADA regulations:

If a physiological disorder affecting the reproductive system constitutes an impairment under the ADA, then "it logically follows from that instruction that reproduction is a covered major life activity. Otherwise, it would make no sense to include the reproductive system among the systems that can have an ADA physical impairment."⁷²

However, as *Zatarain v. WDSU-Television, Inc.*⁷³ points out, the ADA and its regulations indicate that the impairment itself and the major life activity it substantially limits must be separate and distinct.⁷⁴ The mere fact that the reproductive system could be impaired does not mean that reproduction is a major life activity. The *Zatarain* court would not allow the plaintiff "to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment. To articulate plaintiff's analysis, she claims to have a reproductive disorder that interferes with the major life activity of reproduction, which is substantially limited because of her disorder."⁷⁵

The divergent holdings of *Pacourek* and *Zatarain* have generated a significant amount of scholarship.⁷⁶ The ADA and its regulations bet-

or more of her major life activities. In my view, the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons—"caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"—listed in regulations relevant to the Americans with Disabilities Act. *Id.* at 2217 (1998)(O'Connor, J., concurring in part and dissenting in part)(internal citations omitted).

69. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998).

70. *See infra* note 82 and accompanying text.

71. 916 F. Supp. 797 (N.D. Ill. 1996).

72. *Id.* at 801 (quoting *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994)).

73. 881 F. Supp. 240 (E.D. La. 1995).

74. *See id.* at 243.

75. *Id.*

76. *See* Deborah K. Dallman, *The Lay View of What "Disability" Means Must Give Way to What Congress Says It Means: Infertility as a "Disability" Under the*

ter support the *Zatarain* argument. First of all, the ADA itself specifically indicates that the impairment and the major life activity are distinct considerations.⁷⁷ If Congress did intend that a finding of a physical impairment was enough and from that one could infer a substantial limitation of a major life activity, the words following the term impairment "that substantially limits one or more of the major life activities of such individual"⁷⁸ would be superfluous. Congress included those additional elements in defining disability and therefore the elements of a substantial limitation on a major life activity must be met.

Pacourek asserts that if reproduction was not a major life activity, the inclusion of the reproductive system in the EEOC guidelines "would make no sense."⁷⁹ However, the holding of *Pacourek* extends the ADA illogically when applied to the other body systems in the EEOC list. The EEOC specifies that physical or mental impairment means "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; . . ."⁸⁰

Some examples point out the danger in *Pacourek's* logic. First, assume an individual suffers from borderline anemia,⁸¹ a disorder of the hemic system, and fatigues easily, but is able to work and live a full life. Under *Pacourek*, the individual is disabled because the major life activity of producing sufficient red blood cells and hemoglobin is substantially limited by the anemia impairment. One would argue that if anemia was not meant to be included as a disability, then why include the hemic system in the regulations? A second example concerns a stressed out working mother who suffers from irritable bowel syn-

Americans with Disabilities Act, 38 WM. & MARY L. REV. 371 (1996); Bonny Gilbert, *Infertility and the ADA: Health Insurance Coverage for Infertility Treatment*, 63 DEF. COUNS. J. 42 (1996); Katie Cook Morgan, *Should Infertility Be a Covered Disability under the ADA?: A Question for Congress, Not the Courts*, 65 U. CIN. L. REV. 963 (1997); Sandra M. Tomkowitz, *The Disabling Effects of Infertility: Fertile Grounds for Accommodating Infertile Couples Under the Americans with Disabilities Act*, 46 SYRACUSE L. REV. 1051 (1996). For further discussion on the *Zatarain* case, *Abbott v. Bragdon*, and reproduction as a major life activity, see Parmet and Jackson, *supra* note 49 at 26-35. For another article asserting that infertility is a disability, see Rhonda S. Tischler, *Infertility: A Forgotten Disability*, 41 WAYNE L. REV. 249 (1994).

77. See 42 U.S.C. § 12102(2)(A) (1994).

78. *Id.*

79. *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 801 (N.D. Ill. 1996).

80. 28 C.F.R. § 36.104(1)(i) (1997).

81. Anemia is defined as "a condition in which the blood is deficient in red blood cells, in hemoglobin, or in total volume." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 85 (9th ed. 1991).

drome and indigestion when her stress peaks. Once again, applying *Pacourek*, this individual is disabled because her irritable bowel syndrome impairs her major life activity of digestion. One would have to conclude that if irritable bowel syndrome and indigestion were not meant to be included as a disabilities, then why include the digestive system in the regulations? In essence, almost any impairment could be deemed a disability because the impairment substantially limited the major life activity that the bodily system was supposed to perform.⁸²

Commentators have criticized *Zatarain* for its interpretation that the major life activity be separate from the impairment and its rejection of "bootstrapping."⁸³ One argues,

[the *Zatarain* court] conclude[s] the claim of having a reproductive disorder that interferes with reproduction to be circular and unpersuasive because it bootstrapped the limitation from the impairment. But this seems to be shaky use of terminology. . . . It would be interesting to see if this court would hold that being visionless because of an impairment to the visual organs also was bootstrapping.⁸⁴

In reference to the bootstrapping argument, another commentator notes: "By arguing this, the *Zatarain* court makes the bizarre suggestion that the closer the relationship between the impairment and the major life activity that is limited, the less likely that one is to have a disability under the ADA!"⁸⁵

However, these criticisms leveled at *Zatarain* are without merit. The ADA regulations specify several major life activities, including seeing. The regulations state: "The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁸⁶ Thus, because seeing is listed as a major life activity, one need not bootstrap from a finding of an impairment of the special sense organs to ultimately conclude that seeing is a major life activity. By virtue of "seeing" being specified in the regulations, that part of the disability inquiry ends. Also, *Zatarain's* rejection of the bootstrapping argu-

82. In Parmet and Jackson's article, *supra* note 49, the authors refer to this application of logic in an early argument of AIDS/HIV as a disability under the Rehabilitation Act. The authors cited Arthur Leonard's argument that "persons with AIDS are handicapped as a matter of law because the 'ability to fight infection and preserve health is logically a major life function.' Hence their infection constitutes a physical impairment that substantially limits the major life activity of infection fighting." *Id.* at 12 (quoting Arthur Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 691 (1985)). However, this argument again takes the finding of an impairment and assumes a major life activity. *See id.* at 14.

83. Bonny Gilbert, *supra* note 76 at 47.

84. *Id.*

85. Morgan, *supra* note 76 at 983.

86. 28 C.F.R. § 36.104(2) (1997).

ment does not mean that there cannot be a close relationship between the impairment and the major life activity substantially limited. Rather, *Zatarain* seeks to ensure that every finding of an impairment does not automatically result in the finding of a limited major life activity. Just because one has an impairment does not mean that the impairment necessarily limits any major life activity.

Nonetheless, the proponents of *Pacourek* and its progeny might continue to argue that if reproduction were not a major life activity, then why is the reproductive system included in the EEOC listing? Rehnquist's opinion in *Bragdon* provides the answer. There are other impairments of the reproductive system that affect major life activities, such as working, that do not necessarily include the physical act of reproduction. Reproductive disorders such as endometriosis⁸⁷ or dysmenorrhea⁸⁸ could be so painful that they substantially limit a woman's ability to engage in major life activities like walking and working. Rehnquist also noted the disabling effect of cancer of the reproductive organs.⁸⁹ Other impairments of the reproductive system which do not necessarily lead to infertility but are painful enough to interfere with a woman's working life include cystic-ovarian disease, uterine tumors, and pelvic inflammatory disease.⁹⁰

Rehnquist pointed out the failure of the Court to discuss whether reproduction was a major life activity for Abbott herself. He noted, "the ADA's definition of a 'disability' requires that the major life activity at issue be one 'of such individual.' . . . [T]here is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction. . . ." ⁹¹

Rehnquist's insistence on an inquiry into whether or not the major life activity claimed was actually of significance to the plaintiff is supported both in statute⁹² and in common sense. The ADA regulations focus on the need for an individualized inquiry:

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depend-

87. Endometriosis is defined as "the presence of functioning endometrial tissue in places where it is not normally found. The endometrium is "the mucous lining of the uterus." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 411 (9th ed. 1991).

88. Dysmenorrhea is defined as "painful menstruation." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 391 (9th ed. 1991).

89. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2215 (1998); see also Morgan, *supra* note 76, at 982 n.128.

90. Telephone Interview with Peg Schneider, a Physician's Assistant who works at a sexually transmitted diseases clinic (Oct. 5, 1997).

91. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2214-15 (1998)(Rehnquist, C.J., concurring in part and dissenting in part)(citation omitted).

92. See 42 U.S.C. § 12102(2)(A) (1994), cited in *Bragdon v. Abbott* 118 S. Ct. 2196, 2215 (1998)(Rehnquist, C.J., concurring in part and dissenting in part).

ing on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.⁹³

Without this individualized inquiry, absurdities would naturally result. For example, homosexual men or menopausal women that are asymptomatic HIV positive could similarly argue that their major life activity of reproduction is limited by their infection.⁹⁴ However, since sexual orientation or age, not their infection, has precluded reproduction, any argument that reproduction is a major life activity for them is clearly unreasonable.

In *Bragdon*, the Supreme Court failed to meaningfully analyze whether reproduction is a major life activity, instead relying on bare assertion that because an activity is of "comparative importance" or "central to the life process itself," it is necessarily a major life activity. The Supreme Court also neglected to determine if reproduction was, in fact, a major life activity for Abbott. These failures could well result in almost all physical or mental impairments being deemed "disabilities," thus negating the ADA's disability definition. Further, absurdities may result, as individuals are being labeled as "disabled" because their impairment substantially limits a "major life activity" that holds no particular importance for them.

C. No Substantial Limitation on Reproduction

Assuming for the purpose of argument that reproduction does constitute a major life activity, the *Bragdon* holding is still problematic because the physical impairment of HIV-positive infection itself does not substantially limit reproduction. Rather, it is the individual's reaction to the disease which limits reproduction.⁹⁵

The *Bragdon* Court determined that a major life activity was substantially limited if significant limitations resulted from the impairment, even if these limitations were not insurmountable.⁹⁶ Abbott's HIV-positive status served as such a limitation because of the risk of sexual transmission and perinatal transmission. Even if treated with AZT, she still faced an 8% risk of infecting her child with HIV. The Court maintained, "[i]t cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not

93. 29 C.F.R. § 1630.2(j), app., at 350 (1997). After focusing on an individualized determination, the regulations continue, albeit inconsistently: "Other impairments, however, such as HIV infection, are inherently substantially limiting." *Id.* Without further analysis on why HIV infection poses a substantial limitation, this statement regarding HIV is at odds with the ADA's individualized inquiry requirement and seems to have little merit.

94. See Parmet and Jackson, *supra* note 49.

95. See *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156 (4th Cir. 1997).

96. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998).

represent a substantial limitation on reproduction."⁹⁷ However, the *Bragdon* court ignored the fact that the infection itself is not limiting her reproduction. Instead, the Court focused on Ms. Abbott's personal reactions and decisions regarding the infection that *might* limit her reproductive choices.

Rehnquist also noted this, pointing out that an HIV infected individual could still engage in reproductive activities and the choice not to engage in these activities was not a substantial limitation: "While individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a 'limit' on one's own life activities."⁹⁸

*Runnebaum v. NationsBank of Maryland, N.A.*⁹⁹ noted the distinction between being unable to reproduce and choosing not to reproduce. In *Runnebaum*, an asymptomatic HIV-positive employee claimed he was discriminatorily discharged from his job because of his HIV status.¹⁰⁰ Amici for the plaintiff argued that his asymptomatic HIV-positive status "substantially limits . . . procreation and intimate sexual relations . . . because of concerns that the offspring or partner will be infected with the virus."¹⁰¹ The *Runnebaum* court rejected this argument, citing a Department of Justice memorandum which concluded: "[T]here is nothing inherent in the infection which actually prevents either procreation or intimate relations."¹⁰² Rather, "it is 'the conscience or normative judgment of the particular infected person,' not the impairment, that substantially limits procreation and intimate sexual relations."¹⁰³ The *Runnebaum* court read the language that an impairment must substantially limit a major life activity as requiring

a causal nexus between the physical effect of the impairment and one of the major life activities. For example, a paralyzed individual's paralysis is what substantially limits his ability to walk, and a deaf person's deafness is what substantially limits his ability to hear. In the case of asymptomatic HIV infec-

97. *Id.*

98. *Id.* at 2216 (1998)(Rehnquist, C.J., concurring in part and dissenting in part).
99. 123 F.3d 156 (4th Cir. 1997).

100. *See id.* at 163.

101. *Id.* at 171. The argument that HIV-positive infection substantially limits procreation, etc., was accepted by several other courts, including: *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998); *Hernandez v. Prudential Ins. Co. of America*, 977 F. Supp. 1160 (M.D. Fla. 1997); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 774 n.24 (E.D. Tex. 1996); *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992)(applying the Rehabilitation Act).

102. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 171 (4th Cir. 1997)(citing Memorandum from Douglas W. Kmiec, Acting Assistant Att'y General, Off. of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in* 8 Fair Empl. Prac. Manual (BNA) No. 641 at 405:4-7).

103. *Id.*

tion, however, an individual's reaction to the knowledge of his infection—not the infection itself—is what, if anything, substantially limits procreation and intimate sexual relations.¹⁰⁴

The causal nexus requirement in *Runnebaum* makes sense. One's reaction to his or her impairment is not enough. If the ADA's definition of disability means to include the situation where one's reaction, rather than one's actual impairment, substantially limits a major life activity, the definition could have easily been written so as to justify that conclusion. Such a definition could read as follows: Disability means a physical or mental impairment or one's reaction to one's own impairment that substantially limits one or more major life activities. Obviously, the ADA was not drafted this way. Therefore, such a meaning should not be added to the legislative definition.

Continuing with his substantial limitation analysis in *Bragdon*, Rehnquist distinguished present from future limitations:

[Abbott] contends that her ability to reproduce is limited because "the fatal nature of HIV infection means that a parent is unlikely to live long enough to raise and nurture the child to adulthood." . . . But the ADA's definition of disability is met only if the alleged impairment substantially "limits" (present tense) a major life activity . . . Asymptomatic HIV does not presently limit respondent's ability to perform any of the tasks necessary to bear or raise a child. Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects.¹⁰⁵

The reasoning the *Bragdon* majority articulated in support of its holding is too expansive and vague; it opens Pandora's box to claims of disability based on fear of future consequences rather than impairments which actually cause the substantial limitation of a major life activity. The *Bragdon* reasoning rests on the proposition that one's own reaction to an impairment, rather than the impairment itself, can substantially limit a major life activity. When this reasoning is naturally extended, then those carriers of genetic diseases, who themselves suffer no symptoms, may also claim to be disabled under the ADA.¹⁰⁶ These individuals are not physically incapable of bearing children, but the possibility of passing on a genetic disease to their offspring serves as a deterrent to reproduction. Those with a genetic susceptibility to heart disease and cancer¹⁰⁷ might similarly claim that they too are

104. *Id.* at 172.

105. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2216 (1998)(Rehnquist, C.J., concurring in part and dissenting in part)(quoting Brief for Respondent at 22).

106. *See id.* For a provocative article regarding genetic discrimination and the ADA, specifically arguing that presymptomatic individuals with Huntington's disease should be classified as per se disabled under the ADA, see Brian R. Gin, *Genetic Discrimination: Huntington's Disease and the Americans with Disabilities Act*, 97 COLUM L. REV. 1406 (1997).

107. *But see* EEOC Interpretative Guidance to the Federal Regulations (specifying that the impairment definition "does not include characteristic predisposition to illness or disease." 29 C.F.R. § 1630.2(h), app. at 350 (1997)). For further discus-

disabled because they fear not living to see the child mature.¹⁰⁸ One commentator argues that this fear of a premature death might even constitute a mental impairment under the ADA.¹⁰⁹

This reasoning is all based on future possibilities, rather than present disabilities. The ADA does not protect those who may become disabled in the future; rather it protects those who are now disabled. The Executive Director of the American Society of Law, Medicine, and Ethics, Larry Gostin, suggests that the ADA's definition of disability be amended to include "having a genetic or medically identified potential of, or predisposition toward, such an impairment."¹¹⁰ However, such an expansive definition would necessarily include almost all Americans because most people have some genetic condition or predisposition to some type of impairment. The ADA will cease to protect only the truly disabled; rather, those with possible impairments will also seek its protection, rendering the Act's definition of disability virtually worthless.

Furthermore, even if one concludes that the possibility of passing a disease onto a child limits the decision to have a family, how likely does the possibility of transmission need to be? *Bragdon* suggests that an 8% risk serves as a substantial limitation on reproduction.¹¹¹ Substantial means "important; considerable in quantity; significantly large."¹¹² Using this usual interpretation, an 8% risk is not suffi-

sion on the ADA's application to genetic conditions, see Gin, *supra* note 106; Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J.L. & MED. 109 (1991); Charles B. Gurd, *Whether a Genetic Defect is a Disability Under the Americans with Disabilities Act: Preventing Genetic Discrimination by Employers*, 1 ANNALS HEALTH L. 107 (1992); Frances H. Miller and Philip A. Huvos, *Genetic Blueprints, Employer Cost-Cutting and the Americans with Disabilities Act*, 46 ADMIN. L. REV. 369, 369-70 (Summer 1994); Mark A. Rothstein, *Genetic Discrimination in Employment and the Americans with Disabilities Act*, 29 HOUST. L. REV. 23 (1992).

108. See Gin, *supra* note 106. Gin argues that cancer is distinguishable from Huntington's disease because all those who carry the Huntington's gene will someday develop the disease, whereas those with a predisposition to cancer might develop cancer of differing severities, or escape cancer completely. See *id.* at 1415.

109. See *id.* In the context of Huntington's disease, Gin argues that this fear of dying could constitute a mental impairment:

But while it is true that presymptomatic Huntington's individuals may be physically able to engage in any activity they choose, they are nevertheless psychologically burdened by the fact that they will almost certainly die in mid-life. . . . [T]he ADA does not require that a disabled person be substantially limited by a *physical* impairment; *mental* impairments may also be substantially limiting—and certainty of death by mid-life is substantially limiting enough to make a person forgo the experience of having a child.

Id. at 1426-27 (internal citations omitted)(emphasis in original).

110. *Id.* at 1420.

111. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998); see also *supra* note 59.

112. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1170 (9th ed. 1991).

ciently large enough to merit being called substantial. Rather, such a risk could be deemed minimal. One might conclude that other genetic diseases, such as Huntington's disease, with its parent-child transmission rate of 50%, does in fact clearly meet this substantial limitation requirement,¹¹³ whereas HIV transmission is significantly less and should not be deemed substantial.

Moreover, this absence of a *substantial* limitation regarding reproduction in asymptomatic HIV-positive women is supported by the argument that counseling HIV-positive women to forego childbearing is itself a violation of the ADA.¹¹⁴ Taunya Lovell Banks argues at length that discouraging such women not to have children "constitutes separate, different, unequal, and less effective counseling than that received by able-bodied women making reproductive choices."¹¹⁵ Furthermore, she argues that denying HIV-positive women access to "reproductive-related services, including abortion and infertility services, constitutes separate, different, unequal, and less effective medical treatment based on a protected physical disability in violation of the ADA."¹¹⁶ Although Banks assumes that HIV-positive status is necessarily a protected disability, her arguments further support the assertion that HIV infection itself does not substantially limit reproduction. Rather, some asymptomatic HIV-positive women "will consciously want to become pregnant"¹¹⁷ and some will indeed become pregnant. There is nothing about the infection itself which substantially limits reproductive activity.

IV. CONCLUSION

The unfortunate reality is that almost a million Americans are infected with HIV.¹¹⁸ Although many remain asymptomatic for several years, they still face the chilling prospect of death from AIDS. These individuals deserve society's respect and sympathy as their disease progresses to and through the symptomatic stage. However, manipulating the first definition of disability under the ADA, i.e., "a physical or mental impairment that substantially limits [a] major life activit[y]"¹¹⁹ is not the way to engender this compassion.

113. See Gin, *supra* note 106, at 1416.

114. See Taunya Lovell Banks, *The Americans with Disabilities Act and the Reproductive Rights of HIV-Infected Women*, 3 TEX. J. WOMEN & L. 57 (1994).

115. *Id.* at 64.

116. *Id.*

117. *Id.* at 89.

118. See Burr, *supra* note 10.

119. 42 U.S.C. § 12102(2)(A) (1994).

Asymptomatic HIV infection is not a disability because although HIV-positive individuals are clearly impaired,¹²⁰ this impairment does not substantially limit any major life activity. The Supreme Court's reasoning that reproduction is central to the life process, and is therefore a major life activity, is simply too vague. Further, concluding that reproduction is a major life activity because the EEOC regulations list the reproductive system as a body system capable of impairment is a circular argument, and "would allow [the plaintiff] to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment."¹²¹ Such an argument, logically extended, would mean that any form of physical or mental impairment, no matter how unconnected with any reasonable understanding of the term "major life activity," would ultimately be a disability under the ADA, because the impairment would substantially limit the major life activity the bodily system was supposed to perform.

Even assuming reproduction is a major life activity, the physical impairment does not substantially limit reproduction. It is the individual's reaction to the infection, rather than the disease itself which causes many to forgo reproductive activities. Asymptomatic HIV-positive persons can still reproduce, but many might choose not to because they fear that they will transmit the disease to their partner or their unborn child, or that they will impair their own immune system, or because they fear dying before they can complete the job of childrearing. However, such fear of future consequences is not sufficient to show a substantial limitation because the physical impairment, not the person's reaction to it, must substantially limit the major life activity.

Rather than dangerously manipulating the first definition of disability under the ADA, the more reasonable argument that an asymptomatic HIV-positive individual could make for a successful ADA claim is that he or she is regarded as disabled.¹²² The Supreme Court

120. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2204 (1998); see also *Runnebaum v. Nationsbank of Md., N.A.*, 123 F.3d 156, 181 (4th Cir. 1997)(dissenting opinion)(citing Letter from C. Everett Koop, M.D. Surgeon General, to Douglas W. Kmiec, Acting Assistant Att'y General, Off. of Legal Counsel, Department of Justice, reprinted in 8 Fair Empl. Prac. Manual (BNA) No. 641 at 405:18, 405:19). This memorandum can also be located at *Americans with Disabilities Act, 1989: Hearings Before the Subcomm. on the Handicapped, Senate Labor and Human Resources Comm.*, 101st Cong. 338-66 (1989)(memorandum of Douglas M. Kmiec).

121. *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995).

122. See 42 U.S.C. § 12102(2) (1994)("The term 'disability' means, with respect to an individual— . . . (C)being regarded as having such an impairment.") At the Supreme Court, *Abbott* argued alternatively that she was "regarded as" disabled, but because she had failed to assert this argument at the court of appeals, the Supreme Court declined to address this issue. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2214, n.1 (1998)(Rehnquist, C.J., concurring in part and dissenting in part). See also *supra* note 36. For cases applying the "regarded as" disabled definition,

in *School Board of Nassau County v. Arline*,¹²³ in applying the Rehabilitation Act to a suit involving a schoolteacher with recurrent tuberculosis who was fired from her job,¹²⁴ noted that

[b]y amending the definition . . . to include not only those who are actually physically impaired, but also those who are as regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.¹²⁵

Although the Supreme Court specifically declined to address the issue about whether an HIV carrier had a physical impairment or could be regarded as disabled,¹²⁶ such arguments can be made.¹²⁷ Using the "regarded as" prong of the disability definition serves to protect the discrimination claims of HIV-positive individuals,¹²⁸ without dangerously expanding the logical meanings of the terms "major life activity" and "substantially limits" contained within the ADA's first definition of disability.

Although *Bragdon v. Abbott* answered some of the questions with which federal courts had struggled, several key issues remain unresolved. The Court specifically decided not to address whether HIV infection is a per se disability under the ADA.¹²⁹ Reproduction was the major life activity at issue here,¹³⁰ but query whether HIV-positive homosexual men or menopausal women could similarly be found disabled within the ADA's purview. Since their reproductive capabilities are limited by sexual orientation and age, not HIV infection,¹³¹ these individuals would have to find another "major life activity" that is substantially limited by their HIV infection. This might prove to be a very difficult task with the treatments available, the duration of the

see *Runnebaum v. NationsBank of Md., N.A.*, 95 F.3d 1285 (4th Cir. 1996), *rev'd en banc*, 123 F.3d 156 (4th Cir. 1997); *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310 (E.D. Pa. 1994). See, e.g., Kushen, *supra* note 23.

123. 480 U.S. 273 (1986); see also Kushen, *supra* note 23 for his discussion of this case.

124. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 276 (1986).

125. *Id.* at 284.

126. See *id.* at 282 n.7.

127. One would argue that because of others' reactions to the claimant's physical impairment, the claimant was substantially limited in a major life activity (like working). See *supra* notes 36 and 122 and the authorities cited therein; see also Villalba, *supra* note 6; Kushen, *supra* note 23, discussing *School Bd. of Nassau County v. Arline* 480 U.S. 273 (1986).

128. Such arguments are beyond the scope of this Note, but are interesting points for continued exploration.

129. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2207 (1998).

130. The Court noted that Abbott and numerous amici had argued about "HIV's profound impact on almost every phase of the infected person's life," but the Court limited its discussion to reproduction. *Id.* at 2205.

131. See Parmet and Jackson, *supra* note 49.

asymptomatic phase, and the ability of many HIV-positive individuals to live a normal life.

In discussing the presence of a substantial limitation, the Court held, "[i]n the end, the disability definition does not turn on personal choice."¹³² However, *Bragdon v. Abbott* establishes that the disability definition does indeed turn on personal choice. Abbott voluntarily chose not to bear children. Her infection did not limit her; her reaction to the infection did. With *Bragdon* as precedent, one who has a genetic marker can similarly argue that his or her ability to reproduce is substantially limited,¹³³ and therefore, the individual is disabled within the purview of the ADA. In an attempt to protect HIV-positive individuals from discrimination, the Court dangerously stretched the term "disability." The Court has now opened up the floodgates to countless lawsuits involving possibilities and probabilities, rather than disabilities. Under the reasoning of *Bragdon*, fear of future consequences may be enough to render an individual "disabled" under the ADA.

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132. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998).

133. *See id.* at 2216 (Rehnquist, C.J., concurring in part and dissenting in part).